84-1847

Office-Supreme Court, U.S.
FILED
MAY 25 1985
ALEXANDER L. STEVAS,
CLERK

Number _____

to

The Supreme Court of the United States

OCTOBER TERM 1984

Burton R. Landes, Petitioner

vs.

Department of Justice, Respondent

APPENDIX

to

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5635

September Term, 1984

February 19, 1985

BURTON R. LANDES

v.

DEPARTMENT OF JUSTICE

Before: Wright, Mikva and Bork, Circuit Judges

ORDER

On consideration of appellant's petition for rehearing, filed January 29, 1985, it is

ORDERED, by the Court, that the aforesaid petition is denied.

FILED this 19th day of February, 1985.

FOR THE COURT, George A. Fisher, Clerk

/s/ ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5635

September Term, 1984

C.A. No. 83-03615

January 23, 1985

BURTON R. LANDES
Appellant

v.

WILLIAM FRENCH SMITH
U.S. Attorney General, *et al.*

Before: Wright, Mikva and Bork, Circuit Judges

ORDER

Upon consideration of appellees' motion for summary affirmance, and the response thereto, it is

ORDERED by the court that appellees' motion is granted. The district court properly dismissed appellant's complaint because the target agency had no responsive documents. *See* 5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). It is

FURTHER ORDERED by the court, on its own motion, that the Clerk is directed to withhold issuance of this court's mandate until seven (7) days after disposition of any timely filed petition for rehearing.

Per Curiam

FILED January 23, 1985 GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5635

September Term, 1984

DC Civil No. 83-03615
September 25, 1984

BURTON R. LANDES
Appellant

v.

WILLIAM FRENCH SMITH
U.S.Attorney General, *et al.*

ORDER

This matter having been docketed on September 14, 1984 and the docketing statement having been filed, it is

ORDERED that a briefing schedule is set as follows:

Appellant(s) brief and appendix (or record excerpts or General Rule 17(c) transcripts)	December 3, 1984,
Appellee(s) brief	January 2, 1985,
Appellant(s) reply brief, if any	January 16, 1985.

Based upon the foregoing briefing schedule, the Clerk shall include this case in the pool of cases that are available for selection on this Court's March, 1985 calendar.

FILED this 25th day of September, 1984.

FOR THE COURT: George A. Fisher, Clerk

/s/ PATRICIA L. CHATMAN
Deputy Clerk

Form Order #1
(Feb., 1984)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3615

August 28, 1984

BURTON R. LANDES
Plaintiff

v.

WILLIAM FRENCH SMITH
et al., Defendants

MEMORANDUM

This matter came before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction. For the reasons stated herein, defendants' motion is granted.

Plaintiff seeks, through the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, to compel the release of all records maintained by the Federal Bureau of Investigation ("FBI") pertaining to the "Sarah Churchill File." [1]

1 Plaintiff actually sues two agency officials, and seeks to add a third. Even if this Court had jurisdiction to compel the agency to produce the requested documents, which it does not for the reasons discussed below, it clearly has no jurisdiction over the individuals actually named as defendants. FOIA provides only that the courts have jurisdiction to compel *agency* disclosure of improperly withheld documents, 5 U.S.C. §552-(a)(4)(B), and federal government officials sued in their official capacity are not proper party defendants in an FOIA action. *Canadian Javelin, Ltd. v. Securities & Exchange Commission*, 501 F. Supp. 898, 904 (D.D.C. 1980).

FBI Special Agent Michael Roman has filed an affidavit outlining plaintiff's administrative efforts and stating the FBI's conclusion that the agency does not have any documents responsive to plaintiff's request. The Roman Affidavit describes the FBI's attempts to clarify plaintiff's request through personal communication with plaintiff, and states that once the FBI understood that plaintiff wanted FBI files pertaining to Sarah Churchill, the deceased daughter of Winston Churchill, it conducted a thorough search of its files and concluded that it had no responsive documents. Plaintiff exhausted his administrative appeals, and files this action *pro se* seeking *in camera* review of the requested documents and release of all responsive documents.[2]

Defendants argue that this Court lacks subject matter jurisdiction because plaintiff seeks access to records that defendant FBI simply does not have. The Court Agrees. A district court has no jurisdiction in an FOIA case if the target agency has no responsive documents in its possession, since the statute only confers jurisdiction to determine if documents have been "improperly withheld," and an agency cannot "improperly withhold" documents it does not have. 5 U.S.C. § 552(a)(4)(B);

2 It should be noted that plaintiff also filed a "Motion for Summary Judgment" and a letter dated April 23, 1984 in which he requested that the Court review the "Churchill file" *in camera*. Given the FBI's declaration that it has no responsive documents, the Court finds such *in camera* review unnecessary, if not impossible. Because the Court has no jurisdiction, as explained below, plaintiff's summary judgment motion and attorney fee request need not be reached.

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150, 100 S. Ct. 960, 968 (1980); *Marks v. Department of Justice*, 578 F.2d 261, 263 (9th Cir. 1978). In this case, although the FBI originally indicated that it "may" have responsive documents, *see* Roman Affidavit ¶9(G); Exhibit G, after plaintiff clarified the subject matter of his request and the FBI conducted a thorough search for documents responsive to his refind request, it was determined that the FBI had no such documents. Roman Affidavit ¶¶9(K)-(M), 13-15. Plaintiff has not alleged agency bad faith, and the Court sees no reason to question the agency's representation that it has no responsive documents, *see Hayden v. National Security Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). The Court has no jurisdiction, and this case must be dismissed.

An appropriate Order accompanies this Memorandum.

/s/ THOMAS A. FLANNERY
United States District Judge

SIGNED this 28th day of August, 1984.

NO. 84-5635
ATTACHMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3615

August 28, 1984

BURTON R. LANDES
Plaintiff

v.

WILLIAM FRENCH SMITH
et al., Defendants

ORDER

This matter came before the Court on defendant's motion to dismiss. For the reasons stated in an accompanying Memorandum, after careful consideration of defendant's motion and the entire record in this case, it is, by the Court, this 28th day of August, 1984,

ORDERED, that defendant's motion to dismiss is granted; and it is further

ORDERED, that this case be, and hereby is, dismissed.

FILED August 28, 1984

James F. Davey, Clerk

/s/ THOMAS A. FLANNERY
United States District Judge

Request No. 239366

Subject
THE SARAH CHURCHILL FILE

MR. BURTON R. LANDES
11 COLLEGE AVENUE
TRAPPE, PA 19426

July 25, 1983

Dear Requester:

This is to acknowledge receipt by FBI Headquarters of your recent Freedom of Information-Privacy Acts (FOIPA) request and to advise you we will comply with your request according to Title 5, United States Code, Section 552(a)(6)(A)(i) and other Federal statutes and regulations. Additional information, if needed, will be requested by separate letter.

A search of the indices to our records will be made to determine if we have the information you seek. If the search fails to locate record(s) pertaining to your request, you will be notified. If the search locates a record(s) which may be responsive to your request, it will be retrieved and processed according to the provisions of the FOIPA.

Your request has been assigned the number indicated above. Please use this number in all correspondence with us.

Chief /s/ James K. Hall
Freedom of Information-
Privacy Acts Section
Records Management Division